

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

\_\_\_\_\_  
No. 76-1206  
\_\_\_\_\_

JAMES JUNIOR FINCH,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

\_\_\_\_\_  
**BRIEF OF AMICUS CURIAE CROW TRIBE OF  
INDIANS IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**  
\_\_\_\_\_

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### BRIEF OF AMICUS CURIAE CROW TRIBE OF INDIANS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This amicus curiae brief is filed by the Crow Tribe of Indians of Montana, with the consent of both parties. The Crow Tribe, as the lawful government of the Crow Indian Reservation and as the owner by treaty of the exclusive right to hunt and fish on the Reservation, and of the waterspace where the prohibited fishing took place, is the real party in interest, and is the party actually aggrieved by petitioner's violation of the Indian trespass act, 18 U.S.C. § 1165.

A decision on the merits of this appeal substantially affects the inherent sovereignty of the Crow Tribe and its authority to control hunting and fishing within the exterior boundaries of the Crow Reservation. Further,

such a decision directly affects the ability of the Tribe to manage and regulate the development of all of its natural resources and the control over the social, cultural and environmental ramifications of this management within the exterior boundaries of the reservation.

It is the position of the Crow Tribe that the well-reasoned decision of the Court of Appeals should not be disturbed, and that certiorari should be denied.

### QUESTION PRESENTED

The question presented is whether Petitioner, a non-Indian, is entitled to fish in the Big Horn River inside the Crow Reservation (see map, Appendix A below) despite the fact that (a) the Tribe owns the bed of the river and the waterspace above it,\* and (b) the Tribe has an ordinance (Appendix B below) prohibiting fishing on the reservation by non-members. If Petitioner is not entitled to so fish, then the Court of Appeals correctly held that he was in violation of 18 U.S.C. § 1165, which provides:

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe . . . for the purpose of . . . fishing thereon . . . shall be fined not more than \$200 or imprisoned not more than ninety days, or both . . . ."

### STATEMENT OF THE CASE

The Crow Tribe basically accepts the statement of the case as set forth by the Petition for Writ of Certiorari (Pet.) at pp. 2-3.

\* Or more precisely, the United States owns the bed and waterspace in trust for the Crow Tribe.

### REASONS FOR DENYING THE PETITION

1. On the question of ownership of the streambed, the Court of Appeals below made no new law. It merely followed *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), which held that ownership of the streambed of a navigable river within an Indian reservation depends on the facts—what the treaty says, what the United States intended, and what the Indians understood.

Proceeding accordingly, the court made a thorough factual analysis of those factors, and concluded (Pet. pp. 14A-15A):

"It is quite clear, in light of the foregoing, that in establishing the Crow Reservation, the United States intended that all lands therein, including the riverbed, were to be for the exclusive use of the tribe."

Petitioner says (p. 7) that the Court of Appeals held "that the mere creation of an Indian reservation, having within its boundaries, a navigable stream, is evidence of the intention of the United States to deviate from the national policy of reserving beds of navigable water bodies for future states."

The Court of Appeals held no such thing. What the court did was, first, it analyzed the *Choctaw* and *Holt Bank* cases to see how this Court approached similar problems in the past (Pet. pp. 8A-10A). Then it analyzed at length the relevant treaties, the negotiations, and the surrounding facts (Pet. pp. 10A-16A). Then it weighed the pros and cons, and concluded that the Crow case was more like *Choctaw* than *Holt Bank*, so that the Crow Tribe, like the Choctaw Tribe, owned the streambed.

Although not relied upon by the Court of Appeals in its opinion, Art. II of the Crow Treaty of 1868, 18 Stat. 649, defines part of the Crow reservation boundary as "thence up said mid-channel of the Yellowstone" River.



We submit that this description is clear proof that Congress intended to grant the bed out to the mid-channel, and indirect proof that Congress intended to grant the full width of the bed to the Tribe in locations where it lay entirely within reservation boundaries. The District Court's first opinion (page C-3 n.1 below) relied on this in holding that the Tribe owned the bed. Similar language supported this Court's conclusion in *Choctaw*, 397 U.S. at 631-633. This method of description was continued in subsequent statutes which redefined the reservation boundaries. Act of April 11, 1882, 22 Stat. 42, a grant of right-of-way to the Northern Pacific on July 10, 1882, 22 Stat. 157; and the ceding of reservation lands in the Act of March 3, 1891, 26 Stat. 989, 1039.

It is interesting to note that the District Court, in ruling for Petitioner, reversed its own previous (unreported) ruling on September 4, 1974, in this same case (reprinted below, Appendix C), that the riverbed of the Big Horn River was in fact owned by the Tribe. The court said,

"... the conclusion is inescapable that the river bed of the portion of the Big Horn River in question belongs to the Crow Tribe." At p. C-3 below.

The record does not show why the District Court changed its mind.

2. The Court of Appeals further concluded that the casting of a fishing line and lure from non-Indian land into the waters over the tribally owned riverbed is an intrusion sufficient to constitute a trespass (Pet. p. 16A). This is not new law, see Prosser on Torts, § 13 at 69 (1971), cited by the Court of Appeals. The Court of Appeals was clearly right.

3. The Court of Appeals also rejected the claim that the tribal ordinance (banning non-members from fishing on the reservation, see Appendix B below) violated

equal protection of the laws as guaranteed by the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (Pet. p. 20A). The court was clearly right, and laid down no new principles. This Court has had four recent occasions to consider laws treating Indians differently than others. In each case, this Court concluded that the differences in treatment were constitutionally permissible. *Morton v. Mancari*, 417 U.S. 535 (1974); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), both cited by the Court of Appeals; and see also *United States v. Antelope*, Apr. 19, 1977, U.S. Law Week 4362; *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976). See also *United States v. Pollmann*, 364 F. Supp. 995, 1002 (D. Mont. 1973), a case involving, like the instant case, a non-Indian fisherman prosecuted under 18 U.S.C. § 1165.

4. The Court of Appeals also held that a riparian right to fish, if any existed, was subject to regulation by the governing authorities (Pet. p. 18A, footnote 23). The Court stated that the existence of any riparian right to fish must be determined by federal law (Pet. p. 17A). The court then concluded that the language and history of 18 U.S.C. § 1165 indicates that the right in the Crow Tribe to control hunting, trapping, and fishing on its lands is a "prerogative of ownership which the United States recognizes as a matter of federal law" (Pet. p. 19A).

The court could hardly have reached any other conclusion, in light of Art. II of the 1868 Treaty, 15 Stat. 649 (quoted by the Court of Appeals, see Pet. p. 14A) which provides that "no person", with certain exceptions not here relevant,

"... shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians..."

## CONCLUSION

Wherefore, Amicus Curiae, Crow Tribe, submits that the Court of Appeals was correct on each of the issues presented by the Petition, and that no important question requiring a further examination of the opinion of the Court of Appeals is necessary. There is no confusion or conflict with cases in other jurisdictions that would justify the granting of this writ, and Petitioner cites no such conflict. The petition for certiorari should be denied.

Respectfully submitted,

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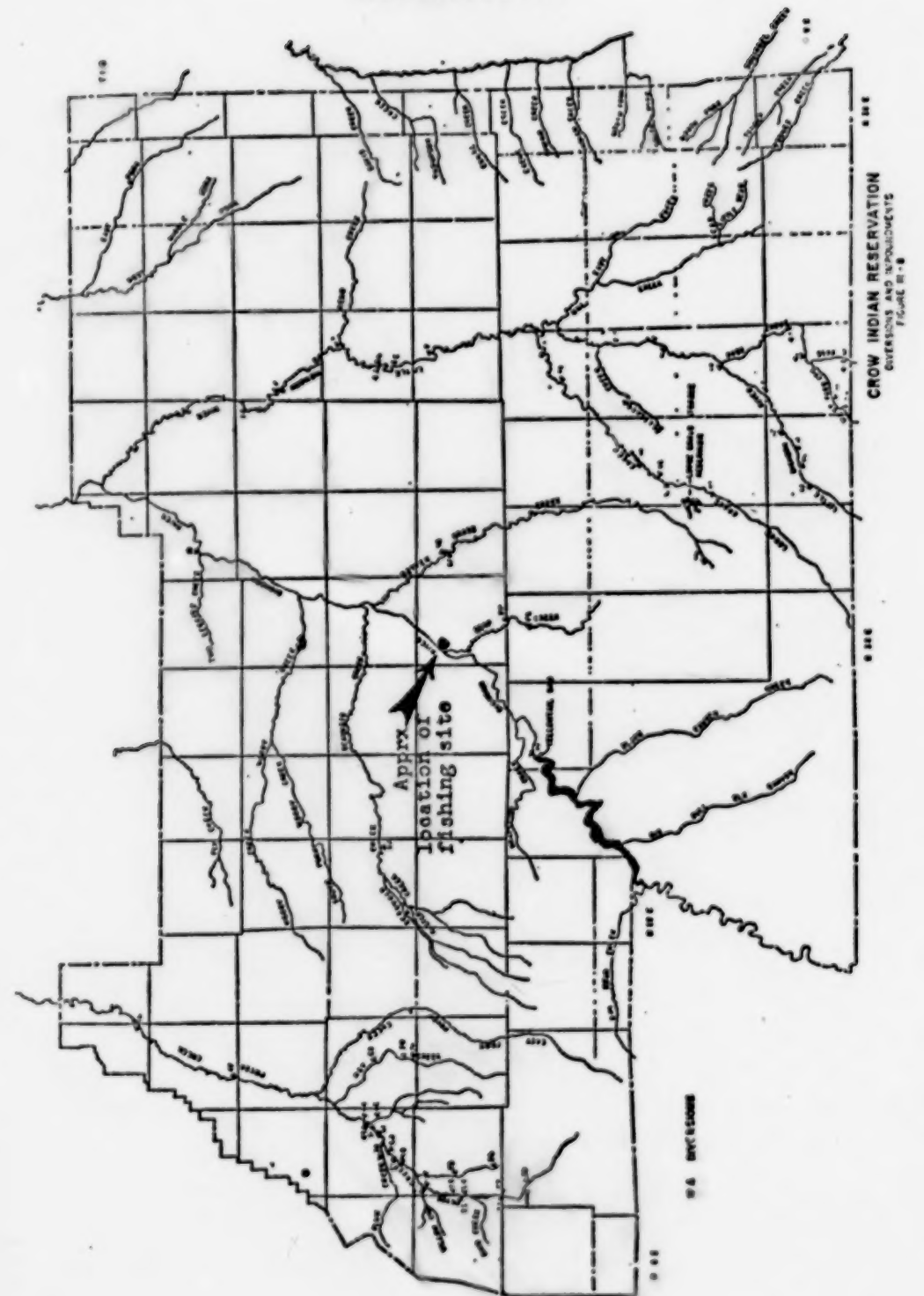
CATE, LYNAUGH & FITZGERALD  
*Of Counsel*

April, 1977

## APPENDICES

A-1

APPENDIX A



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APPENDIX B

RESOLUTION NO. 74-05

RESOLUTION TO RESTRICT HUNTING ON THE  
CROW INDIAN RESERVATION BY THE ADOPTION  
OF AN ORDINANCE, AND FOR OTHER PURPOSES.

WHEREAS, during the past decade there has been a 28% increase in the enrollment of the Crow Tribe and there has been an unprecedented rise in the prices of meat and meat products, and all of these things have caused economic hardships on Crow Tribal members, and

WHEREAS, by virtue of Resolutions No. 64-20 and 67-12 passed, approved, and adopted on November 16, 1963 and September 17, 1966 by the Crow General Council, the Crow Tribe has permitted limited hunting of small game and birds and has permitted fishing on the Crow Indian Reservation, and has caused to be sold hunting and fishing licenses to non-enrolled members of the area and other people thus permitting these said people to hunt and fish within the exterior boundaries of the Crow Reservation, and

WHEREAS, there now exists a shortage of game and fish and this shortage causes an economic hardship to members of the Crow Tribe who for centuries have depended on game to supplement their diet, so

THEREFORE, BE IT RESOLVED, that to help alleviate the game and fish shortage and to help the economic condition of the Crow people that Resolutions No. 64-20 and 67-12 as passed, approved and adopted by the Crow Tribal Council on November 16, 1963 and September 17, 1966 are herewith rescinded, repealed, and removed from the Crow Tribal records, and

BE IT FURTHER RESOLVED, that no more hunting licenses shall be sold to nonenrolled people, and that the



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following Ordinance shall regulate hunting and fishing on the Crow Reservation from this day forth, and said Ordinance shall read as follows:

#### ORDINANCE

BE IT ORDAINED, by the Crow Tribe, meeting in a duly held and noticed Council that hunting, fishing, and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directed and authorized to enforce the provisions of this ordinance and any Federal Statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall no [sic] apply to members of the Crow Tribe of Indians.

BE IT FURTHER RESOLVED, that the Crow Tribal officers informed the State Fish and Game Department for the State of Montana and Bureau of Indian Affairs (United States Department Interior) that hunting and fishing on the Crow Indian Reservation is hereby closed.

PASSED, APPROVED, AND ADOPTED by the Crow Tribal Council this 13th day of October, 1973 by unanimous votes for passage and adoption and no votes against passage and adoption.

ATTEST:	/s/ David J. Stewart
	DAVID J. STEWART,
/s/ Frederick V. Lefthand	CHAIRMAN
FREDERICK V. LEFTHAND,	Crow Tribal Council
SECRETARY	
Crow Tribal Council	/s/ George A. Laverdore
	GEORGE A. LAVERDORE,
	ACTG. SUPERINTENDENT
	Crow Indian Reservation

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#### APPENDIX C

(First order of District Court holding  
that Crow Tribe owns bed of river)

#### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BILLINGS DIVISION

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CR-74-25-BLG

UNITED STATES OF AMERICA,  
*Plaintiff,*

—vs—

JAMES JUNIOR FINCH,  
*Defendant.*

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#### ORDER

Presently pending in this action is the motion of defendant to dismiss. The Information on file herein charges that the defendant

“ . . . did without lawful authority or permission and for the purpose of fishing thereon, unlawfully and knowingly go upon land . . . , being a portion of the Big Horn River. The said JAMES JUNIOR FINCH was standing upon the land belonging to the State of Montana for the benefit and use of the State Fish and Game Commission, while fishing in said Big Horn River, said river being Indian Trust Land, closed to hunting and fishing to all non-Crow citizens, all contrary to the provisions of 18 U.S.C. § 1165.”

18 U.S.C. § 1165 reads in pertinent part:

"Whoever, without lawful authority or permission willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group, and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of . . . fishing thereon, or for the removal of . . . fish therefrom, shall be fined . . ."

Defendant's motion raises the following issue: Whether or not the casting of a lure in the Big Horn River by a non-Crow citizen could constitute a violation of 18 U.S.C. § 1165. Essential to the resolving of this issue is a determination of whether the portion of the river bed in question belongs to the Crow Tribe.

The defendant points to the case of *United States v. Holt State Bank*, 270 U.S. 49 (1926), where the United States Supreme Court found that title to the bed of Mud Lake, a navigable waterway within the Red Lake Reservation, had not been granted by treaty or Act of Congress to the Chippewa Indians. The Court stated:

"There was no formal setting apart of what was not deeded, nor any affirmative declaration of rights of Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus came to be known and recognized as a reservation. *Minnesota v. Hitchcock*, 185 U.S. 373, 380. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; or anything evincing a purpose apart from the established policy, before stated, of treating such lands as held for the benefit of the future state. 270 U.S. at 258-59.

Implicit in the above language is the recognition that the United States may, by treaty or Act of Congress, grant Indians title in river beds. Thus, the Supreme Court held in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); that the Choctaw Nation received title to land underlying a navigable portion of the Arkansas River. The Court stated at 397 U.S. 634:

"Together, petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers."

Considering *Choctaw Nation*, the treaties involved in this case, and the nature of the Crow Tribe's title, the conclusion is inescapable that the river bed of the portion of the Big Horn River in question belongs to the Crow Tribe.<sup>1</sup> See *U.S. v. Haug and Mill*, Misc. Crim. No. 511 (Memorandum Opinion and Order dated June 9, 1971).

Thus, the casting of a lure in the Big Horn River by a non-Crow citizen could constitute a violation of 18 U.S.C. § 1165. As Judge Jameson has held in *United States v. Pollman*, 364 F.Supp. 995 (1973):

"Land \* \* \* includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, whether by nature, as water \* \* \*."

<sup>1</sup> The Act of March 3, 1891, describes a portion of the border of ceded land as follows:

". . . thence in a due easterly course on a parallel of latitude to a point where it intersects the midchannel of the Big Horn River, thence following up the midchannel of said river to a point where it crosses the Montana and Wyoming state line." (§ 1.)

Such a boundary designation running to the midline of the channel of the river in question is a clear indication that Congress intended to convey a part of the river bed and to retain the remainder of the river bed within the Reservation.

It embraces not only the surface of the earth, but everything under or over it. \* \* \* It has in its legal signification an indefinite extent upward and downward. \* \* \* Black's Law Dictionary (Revised Fourth Edition 1968)." 364 F.Supp. at 999.

Ownership of the waters of the Big Horn River is not critical for determination of the motion pending before this Court. Title 18 U.S.C. § 1165 defines an offense against the United States over which this Court has jurisdiction. Within the wording of the statute, the information charges the defendant with unlawful fishing upon Crow Tribal land. The information is sufficient on its face.

IT IS THEREFORE ORDERED that defendant's motion to dismiss is denied.

Also pending in this action is the motion of the State of Montana, acting by and through the State Fish and Game Commission, to appear in these proceedings as *amicus curiae* with right to submit to the Court arguments and briefs as may be appropriate. Good cause appearing therefor, IT IS ORDERED that said motion be granted.

IT IS FURTHER ORDERED that counsel appear before the Court, in Chambers at Billings, Montana, at 9:30 o'clock a.m. Monday, October 7, 1974, for the purpose of a pretrial conference.

Done and dated this 4th day of September, 1974.

/s/ James F. Battin  
United States District Judge